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No. 02-674

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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

CHARLES GREINER, Superintendent,
Green Haven Correctional Facility

Petitioner,

V.

HILDEN MENDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court review a decision of the Second Circuit Court of Appeals which correctly followed the law as prescribed in Brady v Maryland, 373 U.S. 83 (1963) and its progeny, and did not establish any new category of Brady material?

2. Is certiorari review warranted where the Second Circuit Court of Appeals applied the precise Brady materiality standard prescribed by this Court?

3. Should this Court decline to grant certiorari because the Second Circuit Court of Appeals correctly applied 28 U.S.C. § 2254(d) and (e)?

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IN THE
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October Term, 2002

CHARLES GREINER, Superintendent,
Green Haven Correctional Facility

Petitioner,

-against-

HILDEN MENDEZ,

Respondent.

STATEMENT OF THE CASE [1,2]

Facts

Respondent Mendez was accused of shooting three people on August 3, 1990. The target of the shooting, Johnny Rodriguez, was shot numerous times and lived. Another man, Albert Hayles, was killed. Nelson Suarez was less seriously injured and also lived. Shortly after the shooting, both Rodriguez and Suarez described their assailant to the police as being an Hispanic man, about

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[1] Respondent Mendez adopts petitioner's Appendix, for purposes of page references to the decisions below.

[2] Respondent Mendez adopts the detailed statement of the facts in the Magistrate's report, which was adopted by the District Court.

5'2" or 5'4" and 130 pounds. Respondent Mendez was 6'2" tall and 190 pounds. A third prosecution witness testified that he was present and got a good look at the shooter and that that man was not in the courtroom; it was not Mendez. A defense witness, David Pacheco, was also there and also testified that Mendez was not the shooter. Mendez was, nevertheless, convicted.

At the trial, the prosecutor elicited testimony about Detective Martinez's investigation into the subject shooting and testimony from Viterbo Abreu and Johnny Rodriguez about the supposed motive for the shooting. Abreu and Rodriguez claimed that Mendez shot at Rodriguez to avenge a prior incident, in which an associate of Rodriguez had fired shots at Mendez. The prosecutor heavily emphasized this motive testimony in her summation, maintaining that it supported the claim that petitioner was the shooter.

Unbeknownst to the defense, the prosecution possessed information that somebody else – Oswaldo Rodriguez – had admitted his responsibility for the shooting, saying he had put out a "hit" on Johnny Rodriguez because Rodriguez had stolen money from him and used it to buy a Mercedes. This information had been conveyed by out-of-state law enforcement officials to Detective Martinez a year before Mendez's trial. Martinez recorded notes of this conversation and, in turn, contacted the prosecutor in charge of Mendez's case, Sharlene Browne, who recorded her own notes and told Martinez to warn Johnny Rodriguez of the possible continuing threat to his life. Neither Browne nor Carol Sharpe, the prosecutor who subsequently conducted the trial, saw fit, however, to disclose the notes or the information contained in them to the defense. Left in the dark,

the defense, in arguing that Mendez was wrongly identified, had no specific theory to counter the prosecution's motive testimony, let alone, point a finger of guilt at somebody else – Oswaldo Rodriguez and his hit man.

Only after the trial was long over, shortly after oral argument on the appeal, was the information disclosed by the Assistant District Attorney handling the appeal. He had recently discovered it in the file and he indicated that he was turning it over to appellate counsel pursuant to his obligations under Brady v. Maryland, 373 U.S.83 (1963). He also provided additional information and law enforcement reports corroborating and expanding on the original, undisclosed information. Based on the prosecution's failure to disclose this Brady material at or before trial, Mendez moved to set aside the verdict under New York's Criminal Procedure Law § 440.10.

At a hearing conducted pursuant to that motion, the various witnesses confirmed all of the information in the reports. None of the individuals mentioned in the undisclosed documents knew or were associated with Mendez in any way, though they were quite familiar with Johnny Rodriguez and with each other. Moreover, the prosecutors acknowledged their awareness of the subject documents and their failure to disclose them or the information contained therein to the defense. The first prosecutor, Browne, confirmed, as indicated in her original note, that she told Detective Martinez to warn Johnny Rodriguez that the hit was still out on him. The second prosecutor, Sharpe, said she consulted Martinez about the note but that he said the information did not check out.

Detective Martinez, who was in charge of the case, testified that he did virtually nothing to follow up on the information provided to him. Indeed, the only thing he did was to check if there had been a police report of the robbery of the 100,000 dollars in drug money alleged to be at the root of the order to kill Johnny Rodriguez. Given the understandable reluctance of a major drug dealer to report such a theft to the police, the detective's inquiry, not surprisingly, resulted in a negative finding. At the hearing, though, the defense presented Francis Paulino, the man named in the Brady documents as having been present at the robbery (and whose address was included, as well), and he indeed confirmed that the robbery of Oswaldo Rodriguez's drug money had taken place.

The state court denied the motion to vacate the judgment, concluding that the undisclosed evidence was "not favorable to the defense and did not tend to exculpate defendant of the charges." The state court did not address the defense argument that the motive established by the Brady material was entirely different than the motive theory upon which the prosecution had heavily relied at trial.

Magistrate's report and recommendation, and District Court's decision

Upon Mendez's petition for a writ of habeas corpus, Magistrate Andrew Peck issued a lengthy and detailed report and recommendation. Magistrate Peck concluded that the suppressed evidence was both favorable and material and recommended that the petition be granted. The evidence that Oswaldo ordered a hit on Johnny Rodriguez was favorable as both exculpatory and as

impeaching of Johnny Rodriguez and the police, and could also have been used to undercut the thoroughness of the police investigation. Citing Strickler v Green, 527 U.S. 263 (1999), Kyles v Whitley, 514 U.S. 419, 457 (1995), and United States v Bagley, 473 U.S. 667,682 (1985), Magistrate Peck stated the Brady materiality standard ("evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") (44a). Carefully applying that standard, Magistrate Peck concluded that Mendez had met it (47a-65a). Suppression of the evidence "undermined confidence in the outcome" of the trial; he could not be "confident that the jury's verdict would have been the same" if the undisclosed evidence had been given to the defense to investigate and use at trial, citing Kyles v Whitley, supra, 514 U.S. at 453 (63a-65a).

After engaging in the analysis required by 28 U.S.C. §2254(d)(1) Magistrate Peck further found that the state judge had unreasonably applied Brady v Maryland, supra, 373 U.S.83, and its progeny,(65a-68a). According to the Magistrate and contrary to the state judge's opinion, the undisclosed evidence clearly was favorable, as both exculpatory and impeaching, citing Strickler v. Green, supra, 527 U.S.263 on the "favorable" issue.

The District Court, Judge McKenna, accepted the Magistrate's "findings and recommendations in whole, for the reasons set forth in his thorough and careful Report". It granted the petition to the extent set forth in the report.

The Second Circuit's decision

The Second Circuit affirmed "the decision below substantially for the reasons stated in the thorough and convincing opinion of" Magistrate Peck, adopted in full by the District Court. It wrote "only to emphasize a few pertinent aspects of the state court record" (2a). At the outset it acknowledged that the Brady materiality standard had been fully set forth in the decision below (3a), then restated: In the context of Brady, a defendant is deprived of a fair trial only where there is a reasonable probability that the government's suppression affected the outcome of the case, or where the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict", quoting Kyles v Whitley, supra, 514 U.S. at 435.

Quoting United States v. Agurs, 427 U.S. 97,112 (1976), it also noted that the undisclosed evidence "must be evaluated in the context of the entire record" (3a). The Second Circuit concluded that the evidence was favorable because it would have allowed the defense to advance an alternative motive theory that strongly suggested an alternative culprit (Oswaldo Rodriguez) (3a-4a). The evidence was also favorable because it could have been used to challenge the thoroughness and adequacy of the police investigation (9a). After evaluating the undisclosed evidence in the context of the entire record, the Second Circuit concluded that "the suppressed information, which strikes at the central weaknesses in the prosecution's physical identification of Mendez and proffered motive for the shooting, undermines our confidence in the jury verdict" (11a).

The State's petition

In seeking a writ of certiorari, petitioner frames three questions for review, none of which warrants this Court's intervention. Petitioner's "questions presented" misstate and mischaracterize the Second Circuit's decision, reasoning, and conclusions. Contrary to these mischaracterizations, the Second Circuit's analysis clearly followed Brady and its progeny, broke no new legal ground and reached the correct conclusion. Moreover, the Second Circuit opinion and the report which it substantially adopted are uniquely fact specific in nature. Indeed, the issue of whether the undisclosed favorable evidence is "material" is inherently a highly fact based one. Besides petitioner's mischaracterization of the Second Court's decision, petitioner's factual statement is incomplete and misleading.

Petitioner's presentation of the facts

True, Johnny Rodriguez and Nelson Suarez gave fairly consistent descriptions of the shooter, but those descriptions were utterly inconsistent with Mendez's physical characteristics. Detective Vickery testified that Rodriguez described the shooter as 5'4", 130 pounds. Suarez described the shooter (to Detective Martinez) as 5'2" to 5'8", 130 pounds. Mendez, however, was 6'2", 190 pounds, about 6 to 12 inches taller and 50% heavier than the described shooter.

Though Rodriguez and Suarez were at different hospitals and could not confer at that time, their identifications of Mendez were both procured after conversations with Detective Martinez, who could easily have been the conduit

through which they, in effect, conferred. Indeed, they may well have been influenced by Martinez.

With regard to the assertion that Johnny Rodriguez, on the day of the incident, told the police that the shooter was "Tony", Rodriguez's testimony on this is at best ambiguous, since he also testified that he did not know the shooter's name; only some time after he was shot did Rodriguez learn the shooter's name to be Tony. In addition, Detective Vickery, who interviewed Rodriguez that night testified unambiguously that Rodriguez did not mention the name Tony. Nor did Rodriguez tell Vickery that he knew the shooter from a previous shooting incident.[3]

Also omitted from petitioner's recitation of the facts was Rodriguez's testimony that he saw another man with a gun besides the shooter.

As for Viterbo Abreu, who testified that Mendez admitted doing the shooting, petitioner omits the fact that Abreu was arrested for gun possession when Mendez was arrested for the shooting. Abreu even testified that he was initially told by Martinez that the gun charge could be disposed of if he incriminated Mendez. At the time of Mendez's trial, Abreu's case was pending before the same judge who presided at Mendez's trial. The judge was to be reminded of Abreu's cooperation in Mendez's trial when he sentenced Abreu.

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[3] Petitioner also asserts, in discussing the trial, that Rodriguez identified Mendez's photo from an array. While there was hearing testimony to this effect, there was no such testimony at trial. Significantly, Mendez has consistently maintained that that photo procedure, as well as the lineup procedure, were unduly suggestive.

The petition's references to David Pacheco's and Gustavo Guerra's testimony are understandably brief, since each of those witnesses testified that Mendez was not the shooter. Petitioner tries to impugn the credibility or integrity of their trial testimony because they did not tell the police what they had seen. Petitioner goes so far as to say "Mr. Pacheco and Mr. Guerra unexpectedly came forward during the trial to testify that they had actually seen the shooting." What the petitioner does not state is that Gustavo Guerra was a prosecution witness at the trial. Prior to his testimony, the prosecutor and court apparently were aware that Guerra was not going along with the prosecution plan and was not going to identify Mendez as the shooter. Thus it is clear that the prosecution sought to have Guerra testify that Mendez was the shooter, and called him for that purpose. To feign surprise at his testimony that he saw the shooter (and that it was not Mendez) is disingenuous, since the State evidently knew he had seen the incident and shooter. Also notable is that the defense witness, Pacheco, was the husband of Johnny Rodriguez's cousin and had known him for years, yet had no prior knowledge of Mendez (until they met in jail prior to trial). In any event, two witnesses, one for the prosecution and one for the defense, testified that they saw the shooter and it was not Mendez.

Petitioner asserts that the defense never suggested that Rodriguez or Suarez had a motive to lie. While true, this assertion serves to undercut petitioner's arguments. The defense most definitely did suggest that Rodriguez and Suarez lied at the trial. Of course, at the time, due to the State's failure to disclose the favorable evidence provided to it by law enforcement agents in

Virginia, the defense was unaware of any specific motive for Johnny Rodriguez to lie. That motive -- self protection from Oswaldo Rodriguez's continuing threat -- became apparent afterwards when Assistant District Attorney Robert Moore finally disclosed the material which the trial prosecutors had not.

The petition attempts to downplay the significance of Oswaldo Rodriguez's admission in the various notes and reports that he had put out a hit on Johnny Rodriguez, as well as Romulo De Leon's testimony at the hearing that the hit Oswaldo ordered had been effectuated. It cites testimony from Carol Sharpe, the trial prosecutor, who stated that she asked Detective Martinez about the notes, only to be told by him that the information did not "check out". According to the information provided, Oswaldo wanted Johnny Rodriguez killed because Oswaldo believed that Johnny had stolen $100,000 in drug money from Oswaldo's mother's home. Martinez testified that his only attempt to check out the information was to see if a police report had been filed about the stolen drug money; he learned that none had. Pursuant to instructions from Sharlene Browne, the original prosecutor, Martinez warned Johnny Rodriguez that the hit was still out on him.

In recounting the information in the various documents ultimately provided to the defense, the petition states that the "third Virginia [drug crime] suspect" disclaimed knowledge of the shooting or knowledge of any connection between the shooting and Oswaldo. Omitted by petitioner is that this third suspect was Alfredo Matos, the man who, according to the other two informants, was responsible for effectuating the hit. Obviously, his disclaimers to law

enforcement are to be taken with a grain of salt. In contrast, Oswaldo Rodriguez, when asked by the Virginia agents, not only did not deny the information about the hit but confirmed the information from the other two informants (De Leon and Francisco Perez) that Matos "took care" of the hit.

Petitioner's characterization of the report and decision below

Magistrate's report

Petitioner challenges the Magistrate's report and recommendation by maintaining that the Magistrate believed Mendez to be innocent and based all his conclusions on that belief.[4] Petitioner claims that the Magistrate, in allegedly so doing, substituted his own factual findings and ignored the jury's. The Magistrate did no such thing, though. He merely did that which is required by Brady and its progeny - - an evaluation of the trial evidence in light of the previously undisclosed evidence and an assessment of what the jury "could reasonably have found" (64a). Petitioner dismisses the suppressed evidence as "unsubstantiated hearsay." In the process, petitioner disregards the fact that it contained detailed information from two separate informants, that Oswaldo Rodriguez essentially admitted to the Virginia law enforcement agents that he had put out the hit, that Oswaldo Rodriguez's $100.000 in drug money was stolen, providing the motive for the hit, as sworn to by Francis Paulino at the hearing and, of course, that Johnny Rodriguez was indeed shot.

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[4] Petitioner repeatedly states that the Magistrate concluded that Mendez was innocent. Nowhere does the report assert such. An evaluation of the trial evidence, especially when viewed along with the undisclosed evidence however, does strongly point in the direction of Mendez's innocence.

Petitioner grossly distorts the Magistrate's report by extracting quotes out of context. For instance, when the Magistrate states, in the context of evaluating the undisclosed evidence and its potential use, that Matos "was the only person who could positively identify the shooter or shooters" (59a), the Magistrate was clearly discussing only the individuals named within the undisclosed evidence. He was not "disregarding" the trial testimony and was not even discussing it at that point in the report. The same is true with respect to the "[i]nformation about who actually carried out the hit on Johnny Rodriguez", (59a), and about Matos's "first hand" knowledge of "Oswaldo's hit on Johnny Rodriguez" (59a), both of which petitioner complains about strenuously and cites as proof of the Magistrate's incorrect methodology (8-9).

But the Magistrate did not ignore the testimony from Johnny Rodriguez and Suarez. Nor did it disregard Abreu's testimony (which it specifically acknowledged immediately after the out of context quote of which petitioner complains) (9). The Magistrate carefully considered the trial testimony, both those aspects that supported the prosecution's case and those that cast doubt upon it. For example, while recognizing the pro-prosecution identification testimony from Suarez and Rodriguez, and the admission testimony from Abreu, the Magistrate similarly acknowledged the gross inconsistency between the shooter described by Suarez and Rodriguez and the physical characteristics of Mendez. He also recognized that Abreu, as he himself admitted at trial, originally made his statements because he thought the gun charges against him would be dropped and that he may well have hoped for leniency in sentencing. Of course

the Magistrate also recognized that which petitioner wants to discount, that the State's own witness, Gustavo Guerra and defense witness Pacheco both testified that Mendez was not the shooter.

In none of these instances was the Magistrate substituting his own verdict for the jury's or his own factual findings for the jury's. Rather, he was evaluating the undisclosed evidence, the uses to which such evidence could have been put had it been disclosed prior to trial, and the potential impact of disclosure on the jury.

Petitioner claims that prosecution witnesses Rodriguez, Suarez, Abreu, and Martinez would have had to conspire, yet had no apparent motive to falsify. This is simply wrong. Abreu's motive to falsify – to seek lenient treatment on his gun charge -- was evident at trial. Rodriguez's motive became clear from the undisclosed information -- to protect his own life and safety by falsely blaming somebody other than Oswaldo and claiming a wholly different motive. Martinez's motive is less clear, but his inaction in the face of the disclosure to him by the Virginia law enforcement agents, and his connection with each of the witnesses suggest a strong probability that he was the instrument though which a false story from Rodriguez, Abreu and Suarez could have been coordinated. As for Suarez, he could easily have been influenced to identify the 6'2" Mendez, despite his original description of a 5'2" shooter.

Finally, the Magistrate did not ignore the physical evidence. Although the men who provided the favorable information believed that four men were involved in the hit, as the Magistrate recognized, they concededly had not

witnessed the shooting. Thus, the details could have been inaccurate. Indeed, according to the undisclosed evidence, Oswaldo did not witness the shooting, even though it was he who ordered the hit. Finally, Johnny Rodriguez testified that he thought there was another gunman present at the time of the shooting. The Magistrate took this factor into account.

The Magistrate did not reject the state court's factual determinations. Petitioner's view is that the jury's verdict must receive deference and must stand. Petitioner thereby misconstrues the Brady materiality analysis: to determine whether there is a reasonable probability that the jury would have concluded otherwise had the state not withheld the favorable evidence. Furthermore, petitioner wrongly cites 28 U.S.C. §2254(e) ("a determination of a factual issue made by a state court shall be presumed to be correct") as applicable to the jury. In the first place, one cannot know what the jury's factual findings were. All that is known is the jury's ultimate conclusion that Mendez shot Hayles and Rodriguez with the intent to kill. Which particular witnesses were believed or disbelieved, and which particular assertions were believed or disbelieved cannot be ascertained. Thus, there are no particular factual findings to which a court could defer. As for the verdict, as discussed above, the Brady materiality question is whether these is a reasonable probability of a different verdict had the Brady evidence been disclosed.

The deference mandated by §2254(e) as applied in this case, is deference to the State judge's factual determinations at the C.P.L. §440 hearing. This deference was fully accorded by the Magistrate and Second Circuit. It is the

state judge's unreasonable application of law to the facts in finding the undisclosed evidence unfavorable which the Magistrate, District Court and Second Circuit found erroneous. Thompson v Keohane, 516 U.S. 99,108-112 (1995) (presumption of correctness in 28 U.S.C. § 2254(e) applies to basic, primary or historical factual issues, not to mixed questions of fact and law which apply a legal standard to the historical fact determination). Contrary to petitioner's contention (10) the Magistrate's Brady analysis was not in any way predicated on "legally improper, wholesale rejection of the State court's factual determinations". The Magistrate's analysis was required by Brady and its progeny. Rather than rejection of State factual determinations, there was the required analysis of the trial evidence along with the undisclosed evidence to assess whether there was a reasonable probability of a different outcome.

Nor did the Magistrate hold that "unsubstantiated rumor" was Brady material. Rather, it determined that the specific undisclosed evidence in this case could have been used in ways that cumulatively would have resulted in a reasonable probability of a different outcome. Petitioner complains that even if the Magistrate correctly found that the undisclosed evidence could have been used to impeach Johnny Rodriguez, as the Magistrate found, the testimony of Suarez and Abreu would not have been impeached (11). Actually, though, as for Abreu, establishment of a different shooting motive - - a hit by Oswaldo Rodriguez - - as opposed to the story given by Abreu, would indeed have seriously undermined his testimony. More significantly, petitioner again misapprehends the Brady materiality analysis. Contrary to petitioner's apparent

position, the proper analysis does not involve an assessment of whether the trial evidence, untainted by the undisclosed evidence would have been sufficient to convict. Kyles v. Whitley, supra, 514 U.S. at 434-35. Nor does it involve a demonstration by a preponderance that disclosure would have resulted in an acquittal. Id.

As for Johnny Rodriguez's supposed "immediate accusation" of Mendez (11), it was, even at trial, clearly the defense contention, strongly supported by Detective Vickery's testimony, that there was no such immediate accusation. Information about the Oswaldo Rodrigez "hit" would only have served to further discredit the State's weak claim that such immediate accusation had been made.

Finally, the Magistrate's statement that Oswaldo was an "alternate suspect" and that it was favorable evidence that "someone other than Mendez confessed to putting out a hit on Rodriguez" is seriously misinterpreted by petitioner. The Magistrate did not thereby suggest that Oswaldo might be the shooter or that Mendez had been accused of putting out a hit. Rather, the hit motive was totally different from the one ascribed to Mendez through the testimony of Johnny Rodriguez and Abreu, and relied upon extensively and explicitly by the trial prosecutor. Showing a different motive, then, was tantamount to showing a different perpetrator.

Second Circuit decision

Petitioner also quarrels with the Second Circuit opinion. That opinion makes clear that it relies substantially on the reasoning and opinion of the

Magistrate, adopted by the District Court below. The decision does not apply an incorrect Brady materiality standard. This is clear from the Second Circuit opinion's statement of the mandated standard - - "a defendant is deprived of a fair trial only where there is a reasonable probability that the government's suppression affected the outcome of the case, or where the suppressed evidence 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict'", citing Kyles v. Whitley, supra, 514 U.S. at 435(3a). That the opinion also states an alternate formulation of the analysis as enunciated in Leka v. Portuondo, 257 F.3d 89, 104 (2d Cir. 2001), cited with the signal "see also" does not signify abrogation of its previously stated formulation. Though the Second Circuit opinion did not specifically address the "unreasonable application" of Brady jurisprudence, it adopted the District Court opinion which did address that question at length and found that the state did unreasonably apply Brady and its progeny.

The Second Circuit correctly rejected the State's argument that deference to the jury's verdict, reached without the undisclosed Brady evidence, is required. The Second Circuit correctly noted that such analysis would render Brady meaningless (11a).

Petitioner says the majority failed to explain how "the possibility of a person with a motive to order a hit on Johnny Rodriguez benefitted Mr. Mendez" or how it undermined the testimony from Rodriguez, Suarez, and Abreu. First, the undisclosed evidence did not just indicate that there was a person with a motive, but that the person with the motive committed the crime. As the Second

Circuit made clear, and as should be obvious to petitioner, the State's reliance on a particular motive to explain why Mendez supposedly perpetrated the shooting and to bolster very weak identification testimony, would lead to a severe undermining of the prosecution's case if the jury heard that the killing was actually done pursuant to an entirely different motive. The credibility and reliability of the prosecution witness testimony would obviously be seriously damaged, causing the jury to view the evidence in a very different light, and resulting in a reasonable probability of a different verdict.

Petitioner asserts that the dissenting judge applied a different analysis than did the majority, and that that analysis, unlike the majority's, is the correct one. Actually, however, the majority and dissent applied the identical analytical standards. The dissent only disagreed with the majority on the very fact bound question of materiality.

REASONS FOR DENYING CERTIORARI

The Second Circuit correctly applied the law established by Brady and its progeny. Similarly, it correctly applied that law in the context of a habeas petition, as prescribed by 28 U.S.C. §2254. The Second Circuit broke no new legal ground. Indeed there is no legal issue presented for this Court's review. The Second Circuit decision and the Brady issues addressed are uniquely fact specific ones and are, therefore, inappropriate for the granting of certiorari.

Petitioner poses three questions for this Court's review. None of them warrant the granting of certiorari especially, since each one of the questions posed is based on a mischaracterization of the Second Circuit's decision.

1. The Second Circuit opinion did not establish a new category of Brady material.

2. The Second Circuit did not adopt a subjective standard of materiality; it applied the proper materiality standard enunciated by this Court.

3. The Second Circuit did not state that 28 U.S.C. §2254(d) or (e) was inapplicable to a fact-based Brady claim.

1A. The Second Circuit opinion did not establish a new category of Brady material.

The Second Circuit did not state that "unsubstantiated hearsay that amounted to little more than rumor" constituted Brady material. Nor is such a holding in any way implicit in the Second Circuit's opinion. Rather, the court held that the particular evidence which the State failed to disclose in this case was both favorable and material, under the analysis prescribed in Strickler v Green, supra, 527 U.S. 263, Kyles v Whitley, supra, 514 U.S. 419, and United States v Bagley, supra, 473 U.S.667. The decision, as well as the District Court opinion whose reasoning and analysis was substantiality adopted, applied the analysis set forth by this Court both as to whether the evidence was favorable and whether it was material.

The Second Circuit agreed with the District Court that

> in the context of the entire record presented here '[a]dvancing the idea that someone else wanted to kill Johnny Rodriguez, for an entirely different motive

> than the one attributed to petitioner Hilden Mendez (also know as Tony Mendez) as advanced by the prosecution at trial would have given Mendez the opportunity to establish reasonable doubt in the jury's mind as to who shot Johnny Rodriguez....'

3a-4a. It would have allowed Mendez to challenge that motive theory "either through cross-examination or the presentation of contradictory testimony." With the suppressed information Mendez could have developed the alternative theory that the shooting was not done by Mendez, but by a someone acting pursuant to Oswaldo's desire for revenge because Oswaldo thought Johnny Rodriguez had stolen $100,000 from him. The actual killer pursuant to this theory was not Mendez, but was the contract killer hired by Oswaldo Rodriguez. Mendez, according to the State and some of its witnesses, was exacting revenge for a prior incident in which Johnny's friend supposedly shot at Mendez's car. The suppressed evidence supplied an alternative motive for the shooting of Johnny Rodriguez, as well as an alternate killer, especially since there was no connection shown between Mendez and Oswaldo Rodriguez or Alfredo Matos.

Thus, the undisclosed evidence was clearly favorable and the Second Circuit broke no new ground in finding it such.

Petitioner's attempt to characterize the Second Circuit's rationale and holding as ground breaking and "dangerous" is predicated on repeated mischaracterization of the suppressed evidence and the Second Circuit opinion. As set forth above, the suppressed evidence did impeach the State's evidence and was not unsubstantiated hearsay but rather information with a high degree of reliability given the circumstances, including: the number of informants,

Oswaldo's admission to law enforcement, Paulino's confirmation of the robbery of $100,000, a law enforcement agent's initiation of the contact with Detective Martinez, and the prosecutor's request, based on the information provided, that Detective Martinez warn Johnny Rodriguez that the hit was still out on him.

As for the materiality issue, the Second Circuit properly assessed the weaknesses and strengths of the trial evidence, and how they could have been affected had the favorable evidence been disclosed. Carefully applying the standard as prescribed by this Court in the Brady progeny, it concluded that one could not be confident the verdict would have been the same; there was a reasonable probability the verdict would have been different. The Second Circuit recognized that certain evidence may have remained untainted had the suppressed evidence been disclosed, but correctly noted that the materiality issue did not involve an assessment of whether the remaining, untainted evidence would have been sufficient to convict, but whether there was a reasonable probability of a different outcome.

Petitioner seems to argue that impeachment of a witness and exposing sloppy police work are not pertinent to an assessment of materiality. Petitioner cites Justice Scalia's dissent in Kyles v. Whitley, supra, 514 U.S. 419. In Mendez's case, the undisclosed information could have been used for both purposes and the Second Circuit explicitly stated so in assessing materiality. In his dissent in Kyles, Justice Scalia did not express any doubt about the propriety of considering those factors in assessing materiality. Rather, Justice Scalia disagreed on the ultimate materiality question, because, in his view, the trial

evidence against Kyles, even without the evidence which would have been tainted by the undisclosed evidence, was overwhelming. Indeed, the evidence against Kyles was far stronger than the evidence against Mendez. In Kyles, three untainted witnesses remained. Here, at most, just Nelson Suarez was untainted (though the undisclosed evidence would have indirectly raised even greater doubts about his credibility and reliability, These doubts were based on the wide disparity between his description of the shooter's height and weight, and Mendez's height and weight). Morover in Mendez's case, the prosecution's trial evidence was already weakened by the fact that both prosecution witness Gustavo Guerra and defense witness David Pacheco, neither of whom knew or had any reason to lie on Mendez's behalf, both testified that Mendez was not the shooter.

The suppressed evidence indicated not only that someone else had a grudge against Johnny Rodriguez, as petitioner asserts (18), but that that person ordered Johnny's killing and that the hit was effectuated, though the shooting did not result in Johnny's death. The shooter, according to this evidence, was the hired hit man; it was not Mendez. The State, at trial, could not have been more clear in its theory that the shooting was Mendez's revenge for a previous shooting. The shooter's identity went hand in hand with the motive. Changing the motive changes the shooter's identity.

Finally, this was not a case requiring prosecutors to "sift through rumor and braggadocio" (19). The information emanated from phone calls made by Virginia law enforcement agents to Bronx Detective Martinez, essentially telling

the Bronx police that they had solved the shooting – it was the result of Oswaldo Rodriguez's hit order. This supposed "rumor" or "braggadocio" caused the prosecutor to tell Martinez to warn Johnny that the hit order was still in effect. Obviously, and understandably, it was not perceived by anyone at the time as mere "braggadocio" or "rumor" and this is a disingenuous, incorrect, post hoc characterization by petitioner now. Indeed, it does not take a genius to imagine that the jury would have been reluctant to dismiss, as braggadocio or rumor, evidence that the prosecutor deemed reliable enough to result in a warning to Johnny Rodriguez.

Petitioner's claim that reversal by this Court has never been granted in circumstances such as the instant one (19-20) is essentially a challenge to the Second Circuit's finding of materiality. Materiality findings are uniquely fact bound and the Second Circuit opinion is no exception. It is, therefore, particularly inappropriate for a grant of certiorari. Moreover, the Second Circuit's analysis is in accord with this Court's Brady jurisprudence, and reaches the correct conclusion after a careful and well-reasoned analysis. That certain Brady cases from this Court found the undisclosed evidence in those cases not to be material is irrelevant, since the required analysis is fact specific and dependent on the particulars of the trial evidence as well as the particulars of the undisclosed evidence.

Notably, the dissenting opinion does not find that the suppressed evidence was not favorable. Rather, it diverges from the majority only on the highly fact based question of materiality.

In view of the fact bound nature of the issue, the dissenting opinion of Justice Scalia in Kyles v. Whitley, supra, 514 U.S. at 456-58, is significant. Justice Scalia makes the point that Kyles v. Whitley was inappropriate for certiorari because the materiality issue is so much of a "fact bound" one, and further, that the role of the Supreme Court is to decide legal issues, not factual ones. Justice Scalia urged that, given the conformity of findings of the Circuit and District Court, it was wrong for certiorari to have been granted. In the instant situation, again, materiality, a fact bound matter, is at issue. The Second Circuit here was in agreement with the District Court that the favorable evidence was material and the fact based issue is inappropriate for this Court's review. Despite petitioner's attempts to frame one, there is no legal issue for this Court to review.

1B. The Second Circuit did not fail to defer to the factual determinations of the State Court.

Deference to a State Court factual determination under 28 U.S.C. §2254(e) was not even implicated in this case. The only State Court determinations which might have been given deference were those of the State judge after the Brady hearing. The judge's factual determinations, stated in his opinion, though, are not contested. The legal conclusion, involving the application of the law to the facts – that the suppressed evidence was not favorable or exculpatory – certainly is not entitled to deference. It is the very question raised in the habeas petition and indeed one on which the State judge unreasonably applied this Court's jurisprudence.

Petitioner is simply wrong and without any support from this Court in the Brady area in urging deference to the jury's findings. It could not be clearer from the Brady progeny that the materiality analysis requires, let alone allows, critical analysis of the jury's verdict to determine whether there is a reasonable probability it would have been different had the suppressed evidence been disclosed. The jury's verdict was reached without the defense having the benefit of the suppressed evidence and hence, while obviously the verdict must be part of the Brady materiality analysis, it does not receive deference in such analysis.

The jury verdict does not receive deference in the Brady materiality analysis and it never has, whether before AEDPA or after. The jury verdict deference concept is simply irreconcilable with the required materiality analysis which necessarily involves a determination of whether there is a reasonable probability that the undisclosed evidence could have affected the verdict.

Petitioner makes the wild claim that somehow the Second Circuit's opinion will lead to reversal of a "host of State criminal convictions". In fact the Second Circuit opinion does not change the law anywhere, including the Second Circuit.

Since the Second Circuit did not establish any new category of Brady material and engaged in the analysis prescribed by the Supreme Court, certiorari should be denied on question 1.

2. The Second Circuit did not adopt a subjective materiality standard.

The Second Circuit did not change the materiality standard. It applied the correct standard, as set forth by this Court in United States v. Bagley, supra, 473

U.S. at 683, Kyles v. Whitley, supra, 514 U.S. at 433-34, and Strickler v. Green, supra, 527 U.S. at 279. The Magistrate's report adopted by the District Court and whose reasoning the Second Circuit adopted, specifically stated there was a reasonable probability of a different outcome had the favorable evidence been disclosed and elsewhere stated its conclusion that evaluation of the undisclosed evidence in the context of the whole record, United States v Agurs, supra, 427 U.S. at 112, undermined confidence in the verdict. The Second Circuit also specifically stated the reasonable probability standard, as well as the alternative formulation of that standard -- undermining confidence in the outcome. This latter formulation is the very one prescribed in Kyles v Whitley, supra, 514 U.S. at 435, and reiterated in Strickler v Green, supra, 527 U.S. at 288.

The standard prescribed by this Court and applied by the Second Circuit does not involve the substitution of the reviewing court's subjective view, but an objective analysis of the impact of the undisclosed evidence. It is simply another way of recognizing the reasonable probability of a different verdict and whether it puts the "whole case in such a different light as to undermine confidence in the verdict." Strickler v Green, supra, 527 U.S. at 288. Just as Strickler properly used that language, the Second Circuit did. It did not apply an alternative standard. Since the Second Circuit applied the objective standard prescribed by this Court, there is nothing for this Court to correct and no reason to review the Second Circuit decision. Since the Second Circuit applied the proper Brady materiality standard, the petition should be denied on question 2.

3. The Second Circuit properly applied 28 U.S.C. §2254 (d)(1) and (e).[5]

The Second Circuit opinion stated its reliance on the Magistrate's report, as adopted by the District Court. That report engaged in a detailed analysis under 28 U.S.C. §2254(d), finding that the State judge had unreasonable applied Brady and its progeny. Thus, the Second Circuit clearly adhered to the mandate of Williams v. Taylor, 529 U.S. 362 (2000).

The Second Circuit stated:

> We affirm the decision below substantially for the reasons stated in the thorough and convincing opinion of Magistrate Judge Andrew J. Peck, see Mendez v. Artuz, No. 98 Civ. 2652, 2000 WL-722613 (S.D.N.Y. June 6, 2000), adopted in toto by the District Court, see Mendez v. Artuz, No. 98 Civ. 2652, 2000 WL 1154320 (S.D.N.Y. August 14, 2000). We.... write only to emphasize a few pertinent aspects of the State court record.

Given the Second Circuit's affirmance for the reasons stated in the opinion below, petitioner's argument that the Second Circuit majority ignored U.S.C. 2254(d) is a specious one.

Indeed, Magistrate Peck dedicated an entire section of his report to this analysis, entitled: III. THE AEDPA REVIEW STANDARD DOES NOT REQUIRE DENIAL OF HABEAS RELIEF ON MENDEZ'S BRADY CLAIM.

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[5] In its third "question presented," petitioner refers to 28 U.S.C. §2254(e). The corresponding discussion on p. 21-22 of the petition however, appears to refer to 28 U.S.C. §2254(d). In any event, the Second Circuit properly applied both 28 U.S.C. §2254(d) and (e). See pp. 24-25 of this brief regarding §2254(e).

Following a thorough three page analysis, the Magistrate's report concludes the section with: "Accordingly, under §2254(d)(1), the trial court's decision on Mendez's claim involved an unreasonable application of Supreme Court precedent, and therefore Mendez's habeas petition should be granted on the Brady issue" (68a).

Given that the Second Circuit engaged in the proper analysis required by 28 U.S.C. §2254(d)(1) and (e), certiorari should be denied on question 3.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR ALL THREE QUESTIONS.

Respectfully submitted,

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